

original

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

COA: 314342

S CT: 149259

LCT: 12-0003375-FC

Plaintiff/Appellee

v.

Brandon Lewis Cain

Kristina Larson Dunne P 45490
P. O. Box 97 Northville MI 48167
Attorney for the Defendant
248 895 5709

DEFENDANT-APPELLANT'S BRIEF OPPOSING APPLICATION FOR LEAVE
TO APPEAL

PROOF OF SERVICE

149259

BY: KRISTINA LARSON DUNNE (P45490)
PO Box 97
Northville MI 48167
248 895 5709

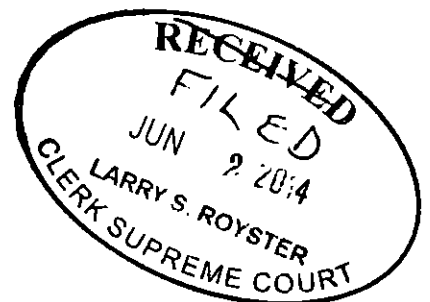


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DEFENDANT'S COUNTER STATEMENT OF QUESTION PRESENTED

I. DID THE TRIAL COURT VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS BY FAILING TO SWEAR THE JURORS AFTER JURY SELECTION, GIVING THEM THE "TRUTHFUL ANSWERS" OATH THEY HAD ALREADY TAKEN PRIOR TO VOIR DIRE AND SKIPPING THE PROPER OATH ENTIRELY?

The Court of Appeals Answers "Yes"

The Defendant Answers "Yes"

The Prosecutor answers "No"

STATEMENT OF THE JURISDICTION AND JUDGMENT APPEALED FROM

The Court of Appeals granted Peremptory Reversal on May 2, 2014. The People timely filed an Application for Leave, with a notice of hearing in this Court on June 3, 2014. Thus, this pleading is timely filed.

COUNTER STATEMENT OF FACTS

In March of 2012 the bodies of Ashley Conaway and Abreeya Brown, who had been abducted in Hamtramck several weeks earlier, were discovered in a park in Detroit. In this highly publicized case, five men including Defendant Brandon Cain were charged with the premeditated murder, torture, and unlawful imprisonment of Ashley Conaway and Abreeya Brown. The prosecutor theorized that although Brandon Cain may not have been directly involved, he organized and planned the crimes as a means to keep these young women from testifying in a prior assault case. In that case, a man named Brian Lee had fired shots at a car occupied by Ms. Conway and Ms. Brown. After jury selection was complete, the jury was excused for the day. The next morning, the following exchange took place:. (Jury Trial Transcript of 10/24/12 p. 16-17): Transcript pages attached as an Offer of Proof.

The Clerk: You need to put your books down.

You do solemnly swear or affirm that you will true answers make to such questions as may be put to you touching upon your qualifications to serve as jurors in the cause now pending before the Court?

The Cain /Lee Jurors:(collectively) I do.

(At about 11:23 a.m.-panel of 16 jurors sworn in the Cain/Lee trial)

At no other time during trial was the appropriate oath given. In other words, when it came time to swear in the jury, they were asked to re-swear the oath that they were given prior to voir dire. The prosecutors did not object, and neither did the defense.

The jury returned guilty as charged verdicts on December 10, 2012. Defendant Cain was sentenced on December 21, 2012 to serve life in prison for the homicide, and terms of years for the lesser counts, plus felony firearm. (Sentencing Transcript 12/21/12). Presently incarcerated, Defendant appealed as of right MCR 7.203. Defendant Cain then moved for Peremptory Reversal. MCR 7.211(C)(4) when he became aware of the case law supporting reversal where, as in his case, the jury was not sworn. Peremptory Reversal was granted. The prosecutor now seeks leave to appeal, MCR 7.302 and Defendant respectfully requests, based on the arguments herein, that this Court find that a grant of the prosecutor's application is unwarranted in this case.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS BY FAILING TO SWEAR THE JURORS AFTER JURY SELECTION, GIVING THEM THE "TRUTHFUL ANSWERS" OATH THEY HAD ALREADY TAKEN PRIOR TO VOIR DIRE AND SKIPPING THE PROPER OATH ENTIRELY.

Issue Preservation: Defendant raised this issue in the court of appeals below. The prosecutor did not object at trial to the failure to swear the jury, nor did the defense, but plain errors do not require preservation as they are structural.

Standard of Review: Appellate courts use a *de novo* standard when reviewing jury instructions, evaluating the instructions in their entirety. *People v Gaydos* 203 Mich App 235 (1994). As stated in *People v Allan* 299 Mich App 205 (2013) citing *People v. Carines*, 460 Mich. 750, 763–764(1999) a Defendant must prove the following: (1) there was an error, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights (it was *structural* error). *Id.* at 763. Once a defendant has established these three requirements, this Court "must exercise its discretion in deciding whether to reverse." *Id.* Reversal is warranted if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Discussion: MCL 768.14 provides that the following oath must be administered to jurors in criminal cases: "You shall well and truly try, and true deliverance make, between the people of this state and the prisoner at bar, whom you shall have in charge, according to the evidence and the laws of this state; so help you God." MCL 768.15 permits substitution of the words "[t]his you do under the pains and penalties of perjury" for "so help you God."

Similarly, MCR 6.412(F) provides that, “[a]fter the jury is selected and before trial begins, the court must have the jurors sworn.” Under MCR 6.412(A), MCR 2.511 governs the procedure for impaneling the jury. MCR 2.511(H)(1) states the following:(1) The jury must be sworn by the clerk substantially as follows:

“Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.”

The courts have opined that the oath that must be administered at the beginning of trial pursuant to statute and court rule protects the fundamental right to a trial by a fair and impartial jury. *People v. Pribble*, 72 Mich App 219, 224 (1976); U.S. Const, Am XIV; *Groppi v. Wisconsin*, 400 US 505, 509 (1971).

This is the “oath” that was given to the jurors after voir dire. (Jury Trial transcript of 10/24/12 p.16-17): Transcript page attached as an Offer of Proof.

The Clerk: You need to put your books down.

You do solemnly swear or affirm that you will true answers make to such questions as may be put to you touching upon your qualifications to serve as jurors in the cause now pending before the Court?

The Cain /Lee Jurors:(collectively) I do.

(At about 11:23 a.m.-panel of 16 jurors sworn in the Cain/Lee trial)

At no other time during trial was the appropriate oath given. In other words, when it came time to swear in the jury, they were asked to re-swear the oath that they were

given. In this case, the trial court did not administer the oath to the jury as provided for by statute and court rule. The trial court's obligation to do so was clearly established by law. Thus, the trial court's failure to swear in the jury was plain error. See *Carines*, 460 Mich. at 763.

First, the prosecutor asks this Court to rule that even where the error, as it is here, is both plain and structural, that under Federal authority there is a third requirement, similar to a harmless error analysis requirement, that must be met beyond the requirements set forth in *Allan, supra*. (See p. 10, Prosecutor's Application for Leave) This third requirement is a review of whether the trial was "otherwise fair and procedurally rigorous". Citing *Charboneau v United States* 702 F3d 1132, 1138 (CA 8, 2013) and *United States v. Turrietta*, 696 F 3d 972 (CA 10, 2012). Defendant would note that the language cited from *Charboneau* by the prosecution is *dicta*. In that opinion, the Federal District court found that an appellate attorney might not raise a denial of public trial issue (a structural error) and focus on other, potentially stronger issues as a matter of appellate strategy- it not actually address whether or not there should be an additional harmless error analysis for all structural errors. Indeed, the denial of a public trial is of a different nature than the entire lack of a jury oath. There is no way to even argue that the lack of a jury oath was somehow acceptable or a matter of trial strategy. There are many shades of gray in the public trial issue and none in the lack of jury oath issue. Indeed, the public trial issue is not *plain* in the same way that the jury oath issue is *plain*.

The reliance on *United States v. Turrietta* is also misplaced. In *Turreitta*, the defendant's trial counsel *knew* that the jury had not been sworn and brought that issue up himself on appeal- a true "appellate parachute" issue. In Defendant Cain's case, not one

of the legal professionals in the courtroom at trial noticed the gaffe- only upon appellate review by appointed counsel was it apparent. Here, Defendant Cain did not purposefully allow the error at trial to go unnoticed.

Defendant Cain is cognizant that there might be some cases where an error is plain, and structural, and but not reversible error because it does not affect substantial rights or implicate the integrity of the judicial system. The juror oath is so fundamental, that it cannot be treated as a mere technical requirement. Even if (which Defendant argues it was not in this case) the *rest* of Defendant Cain's trial was "otherwise fair and procedurally rigorous", using the dicta language of the *Charboneau*- the lack of a juror oath is a fatal flaw in a criminal jury trial.

The prosecutor next argues that the error in Defendant Cain's case should be distinguished from the error in *Allan*. Defendant asks this Court to find that the error is the same both in fact and in effect. A different result would defy established precedent and "seriously affect the fairness, integrity, or public reputation of the judicial proceedings" *Carines, supra*.

The prosecutor seeks to distinguish Cain from *Allan* by noting that in *Allan* no oath was given at all, not an incorrect oath. Defendant Cain acknowledged that if some form of the proper post jury selection pre taking of evidence oath had been given, perhaps with the words in a different order from those prescribed by statute, or if some percentage of words from the correct oath had been given, then it would be possible to argue that the oath was incomplete but sufficient. But in Defendant Cain's case, *no permutation of the proper oath was given at all*. The jury merely heard the same words again that it heard prior to voir dire. These words were not enlightening to the jury and did not serve to advise them

of the proper standards to be followed in any way. *A wrong, unrelated oath is the same as no oath.* This Court, in order to uphold the “fairness, integrity, and ... public reputation of the judicial proceedings” as discussed in *Carines, supra*, must allow the Court of Appeals order granting a new trial for Defendant Cain to stand. There was no substantial compliance here as in *People v Hubbert* (COA#226318) The public trust in the judicial proceedings in Wayne County is at stake. Defendant urges this Court to consider that a trial court that is unable to follow simple statutory jury procedure is not just committing technical errors, but a structural error in the true sense of the word. Defendant believes that this error reveals the disarray and lack of resources in the prosecutor’s office in Wayne County and in that trial court. To allow the prosecutor, who with multiple attorneys involved in this trial – who were all were too distracted or overwhelmed to even notice the problem with the juror oath (the most basic of proceedings) to avoid a new trial in this case would erode the public trust in the judicial system.

Finally, the prosecutor argues that *Allan* was incorrectly decided. Again, relying on *Turrietta, supra*, where the Defendant’s counsel knew that the jury had not been sworn and kept that secret issue in reserve for appeal, the prosecutor argues that there is no federal constitutional guarantee to a sworn jury. *Turrietta* was tried in Federal District court and was not subject to Michigan Law. Defendant Cain’s case originates in a violation of Michigan codified trial law. Reliance on *Turrietta* is misplaced again.

RELIEF REQUESTED

Defendant **Brandon Cain** respectfully requests this Court deny the Prosecution's Application for Leave to Appeal for the reasons stated herein and allow the Court of Appeals order to have immediate effect.

Respectfully submitted,



BY: Kristina Larson Dunne P45490
Attorney for Defendant
P.O. Box 97
Northville MI 48167

Date: May 31, 2014

Kristina Larson Dunne Attorney at Law

P.O. BOX 97 NORTHVILLE MI 48167 248 895 5709

May 31, 2014

Clerk of the Court
Michigan Supreme Court
P.O. Box 30052, Lansing, MI 48909

Re: People v Brandon Cain SCT#149259

Dear Sir or Madam:

Please find enclosed Defendant's Brief in Opposition to the People's **Application for Leave to Appeal** for filing in your Court, plus seven copies, and Proof of Service.

Sincerely,



Kristina L. Dunne

cc: file
Wayne County Prosecutor-Appellate Division
COA Detroit

